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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 76-1796

ALBERT E. OTTOBONI, et al., Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

MOTION FOR LEAVE
TO FILE BRIEF OUT OF TIME AND BRIEF OF
CALIFORNIA INDIAN LEGAL SERVICES AS AMICUS
CURIAE IN SUPPORT OF THE PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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MOTION FOR LEAVE
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The issue of access to geothermal
resources threatens to strike an unharmoni-
ous chord with long-standing principles
of federal Indian law which support the
protected status of Indian people and their
right to own, manage and develop the
resources in and upon their lands. The

Ninth Circuit opinion, which denies non-Indians ownership and access rights to geothermal resources in specific circumstances, was indiscriminately held to be applicable to Indians and their homelands by the Interior Board of Land Appeals. Heirs of Carrie Bethel, No. 74-234, 29 IBLA 210 (1977). Amicus Curiae represents the heirs of Carrie Bethel and Indian people throughout California.

The IBLA reached its decision without regard to the fact that Indians, as opposed to non-Indians, were asserting rights to natural resources. Misconstruing the breadth of the Ninth Circuit opinion, the IBLA ignored the special trust responsibilities of the federal government to Indian people; ignored historical, political and legal precedent for protecting Indian rights to land and natural resources; and gave no significance to the fact that its decision, unlike the Ninth Circuit opinion, specifically dealt with Indian people and natural resources located in and upon Indian land.

This failure of the IBLA to recognize the existence and direction of federal Indian law, as it pertains to land tenure, water and other natural resources, is attributable to the IBLA's uncritical reading of the Ninth Circuit opinion.

It is of utmost importance for the Supreme Court of the United States to explore and clarify the implications of the Ninth Circuit opinion because it threatens to deflect United States Indian policy and the unique and sensible line of precedents which have recognized the rights and interests of Indian people in

the lands and resources of this country.

Bruce J. Friedman, counsel on behalf of Amicus Curiae, applied for admission to the bar of the Supreme Court of the United States at the time the need for this brief amicus curiae arose. Counsel was notified of his admission to the bar during August, 1977. The appropriate consents to file this brief amicus curiae have been obtained from all interested parties and are on file with the Court.

It would be appropriate for this Court, no matter how it decides to dispose of the instant proceeding, to note for publication that the Ninth Circuit opinion is neither dispositive nor authoritative as against Indian claims for the geothermal resources located in or upon their lands. The Geothermal Steam Act of 1970, the latest expression of Congress' will on the subject, expressly exempts Indian lands from the reservation and leasing provisions of the Act. It would frustrate the intent of Congress should the Ninth Circuit opinion be construed to authorize the reservation and leasing, by the United States, of Indian lands for the exploitations of geothermal resources. Such a flawed construction would have direct, and quite possibly adverse, implications for federally recognized Indian water rights [geothermal resources are either water or have an impact on water quantity and quality] and other natural resources located on Indian land.

It is respectfully submitted that the issues here are so significant to Indian

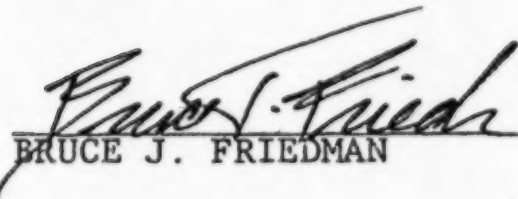
people that it is appropriate to grant
leave to file this brief out of time.

Dated: September 26, 1977

Respectfully submitted,

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Attorney for Amicus
Curiae

By:


BRUCE J. FRIEDMAN

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INTEREST OF AMICUS CURIAE

In accord with Rule 42.1, Amicus Curiae secured consent of the Petitioners and the Respondent to file the instant Brief. The original letters of consent by Moses Lasky, Attorney on behalf of the Petitioners, and by Wade H. McCree, Jr., Solicitor General, on behalf of the

Respondent, are on file with the Court.

Amicus has a considerable interest in the outcome of this case, particularly in its potential adverse impact on ownership and access rights to geothermal resources and other natural resources located on Indian lands.

California Indian Legal Services (hereinafter 'CILS') is a non-profit corporation whose primary purpose is to assist individual Indians and Indian tribes throughout the State of California in asserting and securing their rights. CILS is presently serving as counsel for the heirs of Carrie Bethel, Paiute Indians who inherited fractional interests in a parcel of land which was allotted pursuant to the provisions of Section 4 of the General Allotment Act of 1887, 25 U.S.C. §334. In an appeal to the Indian Board of Land Appeals (hereinafter 'IBLA'), CILS challenged the United States' reservation of geothermal resources, pursuant to the Geothermal Steam Act of 1970, 30 U.S.C. §1001, et seq., in its issuance of an Indian trust patent to the heirs of Carrie Bethel. A brief summary of the appeal and the decision of the IBLA will serve to highlight the interest of CILS and of Indian people throughout California in the instant case.

In the late 1920's Carrie Bethel, an Indian woman, settled on unappropriated public land; she resided on the land until her death. However, it was not until August 5, 1969, that she made formal application for an allotment of land pursuant to the provisions of the General

Allotment Act. The United States Bureau of Land Management (hereinafter 'BLM') approved the application four and one-half years later on February 22, 1974, seventeen days after Carrie Bethel's death. The decision of the BLM approving the Bethel application made an express reservation of geothermal resources:

There will be reserved to the United States all the geothermal steam and associated geothermal resources in the land so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits, upon compliance with the conditions and subject to the provisions and limitations of the Act of December 24, 1970 (84 Stat. 1566).

CILS, on behalf of the heirs of Carrie Bethel, appealed the decision to the IBLA, contending, inter alia, that the reservation and leasing provisions of the Geothermal Steam Act of 1970, 84 Stat. 1566, 30 U.S.C. §1001, et seq., did not apply to the Carrie Bethel Allotment. See, 30 U.S.C. §1014(c)(4). The IBLA delayed its ruling until an opinion was rendered by the Ninth Circuit Court of Appeals in United States of America v. Union Oil Company of California, 549 F.2d 1271 (9th Cir. 1977), the decision now before this Court on petition for writ of certiorari.

On March 22, 1977, following the Ninth Circuit's opinion, the IBLA affirmed the decision of the BLM. Heirs of Carrie Bethel, IBLA No. 74-234, 29 IBLA 210. The

IBLA specifically relied upon the Ninth Circuit's opinion in stating:

In an action brought by the Attorney General of the United States pursuant to Section 21(b) of the Geothermal Steam Act of 1970, 30 U.S.C. §1020(b) (1970), to determine whether the mineral reservation in patents issued under the Stock Raising Homestead Act of 1916, 43 U.S.C. §291 *et seq.*, (1970), reserved to the United States the geothermal resources underlying such patented lands, the Court of Appeals for the Ninth Circuit held that the reservation of "all coal and other minerals" is broad enough to include the geothermal resources. *United States v. Union Oil Co. of California No. 74-1574* (January 21, 1977). Thus, the geothermal resources in the subject land must be considered to be "mineral" within the ambit of statutes and regulations authorizing the reservation of minerals. 29 IBLA 215.

If upheld, the decision of the Court of Appeals may therefore serve as a means to divest Indians of their unique ownership and access rights to valuable natural resources.

STATEMENT

Access to natural resources has been, and continues to be, the sine qua non of

Indian cultural and economic existence and growth. The federal courts have repeatedly recognized and upheld Indian ownership and access rights to natural resources located on or abutting Indian lands, and in areas of aboriginal Indian use and occupancy. See, *Arizona v. California*, 373 U.S. 546 (1963) (water); *United States v. Washington*, 520 F.2d 677, cert. denied, 423 U.S. 1086 (1976) (fisheries).

The Indian land base, with its myriad natural resources, is the primary and most critical means through which Indian people can achieve economic growth and development. The Indian hope for an economically self-determined future¹ is, thus, inevitably linked to the natural resources lying in and upon their lands. The decision of the Court of Appeals may, if this Court does not clarify it, severely limit, if not preclude, access by Indian people to geothermal resources located within the boundaries of their land. Economically speaking, these resources are proving to be of substantial value because of the potential they hold for generating electrical energy. Where economic benefit or access to a valuable natural resource is an issue, there is a real danger that the alarm raised by the government over scarce energy sources will result in a less than even-handed application of the law, prejudicial to vested Indian rights, an event not without historical precedent.

¹/ The goal of Indian self-determination has recently been embodied in federal legislation. Indian Self-Determination and Education Assistance Act (1975), 88 Stat. 2203, 25 U.S.C. §§450 *et seq.*

From a cultural perspective, the physical manifestations of the resource, i.e., hot creeks and springs, have been used by Indian people since time immemorial as an integral part of their culture and religion, and may be jeopardized by insensitive and destructive development.²

REASONS FOR GRANTING THE WRIT

Amicus joins with petitioners in asserting all the reasons contained in the Petition for Writ of Certiorari. The petition comprehensively discusses the several areas in which the Court of Appeals erred and the reasons why this Court ought to review the decision. Amicus additionally wishes to emphasize in this brief the actual and potential consequences of the decision below for Indians who hold title to lands containing water and geothermal resources.

1. The case raises an important issue of first impression under the Geothermal Steam Act of 1970:

^{2/} See, Jersey and Kuhn, Final Report of the Archaeological/Cultural Resources Survey Known Geothermal Resources Area Inyo National Forest and Benton Planning Unit, Mono County, California, at pp. 5, 10, 37 and 38, prepared under U.S. Forest Service Contract No. 04-163 "Inyo National Forest Intensive Archaeological Survey" (January 31, 1976). This report contains extensive documentation of aboriginal Indian use of geothermal areas in Inyo and Mono Counties in California.

Whether the provisions of that act should encompass geothermal resources on lands patented or conveyed prior to its passage and containing a reservation of "minerals" to the United States.

The conclusion of the Court of Appeals, that geothermal steam and related geothermal resources are included within the scope of the phrase "coal and other minerals", as that phrase is used in mineral reservations contained in patents issued under the Stock-Raising Homestead Act of 1916, ignores the fact that geothermal resources were not considered by Congress to be part of the mineral estate in 1916, and also ignores the present-day dispute over the nature of the resource (water versus mineral).

The Court of Appeals has judicially expanded the scope of the mineral grant intended by Congress, despite its acknowledgment that

Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act of 1916; it had no specific intention either to reserve geothermal resources or to pass title to them. [Emphasis added] United States v. Union Oil Co. of California, supra., at p. 1273,

and that

...commercial development of such resources was not contemplated in this country when the Stock-Raising Homestead Act was passed. Id., at

p. 1279.

The willingness of the Court of Appeals to infer an intent which is neither clear from the legislative history, nor explicit in the language of the Act itself, is, in effect, "judicial legislation", and is contrary to the United States Constitution which vests the legislative power in Congress, not the judiciary.

Respondent does not dispute that development of geothermal steam and related geothermal resources as a source of energy was not contemplated in 1916; nor does respondent dispute the fact that geothermal resources were neither known as, nor considered to be, a mineral substance at the time the patent in the instant proceeding was issued. Even present knowledge of this unique resource is limited. One commentator has observed:

Compared to the accumulated knowledge of petroleum geology and engineering, the information now available on geothermal resources is but a primitive beginning. Olpin, *The Law of Geothermal Resources*, 14 *Rocky Mountain Mineral Law Institute* 123, 126 (1968).

The nature of the resource is unclear for it has, at various times, been described as water, gas, and hard mineral.³

^{3/} Allen, *Legal and Policy Aspects of Geothermal Resources Development*, 8 *Water Resources Bulletin* 250, 252 (1972).

It is obvious that classifications and withdrawals of public lands in the early 1900's, based on their potential for mineral development, did not contemplate geothermal resources. Recent scientific identification of geothermal steam as an important and valuable energy source, and its concomitant potential for commercial development, cannot justify a current expansion of the scope of mineral reservations contained in land patents issued prior to enactment of the Geothermal Steam Act of 1970, 30 U.S.C. §1001 et seq. To hold otherwise would sanction a divestiture of title to resources which were neither expressly nor impliedly reserved, and which had passed with the original grant. See, *Davis v. Weibbold*, 139 U.S. 507 (1891).

2. The Decision of the Court of Appeals Ignores Distinctions Between the Water and Mineral Regimes and May, Therefore, Have a Substantial Adverse Impact on Existing Water Rights, Including Reserved Indian Water Rights to Groundwater.

Which body of law applies to the geothermal resource - mineral or water law? This issue is the subject of much comment, speculation and heated controversy. Different legal principles will necessarily come into play if the resource is classified as mineral rather than water. The complexities of the problem have not been resolved by the Geothermal Steam Act of 1970.⁴ Final resolution of the issue must

^{4/} One author points out that "...the legal

eventually be based on a greater knowledge of the resource than now exists, coupled with comprehensive legislation which takes into account the peculiar characteristics of the resource. The Geothermal Steam Act of 1970 is deficient in both of these respects.

Unfortunately, the decision of the Court of Appeals quite arbitrarily places the geothermal resource within the ambit of the mineral estate, even though commercial development of the resource may also produce substantial quantities of water from groundwater sources which also supply irrigation, stock or domestic water. Treatment of the resource as a mineral may, therefore, divest the landowner of valuable rights to groundwater which are essential to the continued utility of the surface lands.

Indian water rights are based in part upon the doctrine of federally reserved water rights first articulated in Winters v. United States, 207 U.S. 564 (1908). Under Winters when the federal government acts to set aside lands for Indian use and occupancy there is an implied reservation of water sufficient to accomplish the purposes for which the lands were set aside.

4/ (Continued)
regime established by the Geothermal Steam Act of 1970 could be cast in doubt if geothermal resources were determined to be similar to water and subject to appropriation and use under state water law principles." Allen, Legal and Policy Aspects of Geothermal Resource Development, supra, footnote 3, at p. 253 (1972).

In the case of Indian allotments, the primary purpose is to provide a viable home for the Indian or Indians residing thereon. This reservation of water has been held to be a flexible one, including future, as well as present, needs of the Indians occupying the land. Arizona v. California, supra, at p. 600; Conrad Investment Co. v. United States, 161 F. 829, 832 (9th Cir. 1908). This Court recently upheld the application of the Winters Doctrine to groundwater sources. Cappaert v. United States, 426 U.S. 128 (1976).

The decision of the Court of Appeals poses a major threat to reserved Indian water rights to groundwater sources. Where a hydraulic connection exists between the water of the geothermal resource and other groundwater sources, there will necessarily be a danger of depletion or pollution of the groundwater source in the course of geothermal drilling and exploitation. In areas where surface water resources are scarce, the groundwater source, including the geothermal resource, may be a critical element of the Indian water right.

If the geothermal resource is, in fact, more water than mineral, then classification of it as a mineral creates an obvious conflict between the federal government's express reservation of the "mineral" resources to itself and its implied reservation of the water resources for the benefit of the Indian lands reserved. The mineral reservation, if it is deemed to include the geothermal resource, is inconsistent with, and may actually

diminish, the quantity and quality of water reserved.

The decision of the Court of Appeals utterly fails to take account of its potentially farreaching impact on existing water rights, both federally reserved water rights as well as groundwater rights acquired under state laws based on the doctrine of appropriation. Given the complex scientific and technological questions which surround any discussion of the mineral and water properties of the geothermal resource, it is critical that the problem be addressed through comprehensive legislation rather than through judicial interpretation of a legislative history which is devoid of any indication that the Congress in 1916 knew of the existence of geothermal resources, much less intended to include them within the parameters of the mineral estate.

3. Indian Lands are Expressly Exempted From the Reservation and Lease Provisions of the Geothermal Steam Act of 1970, the Latest and Only Direct Expression of Congressional Intent on the Subject.

The Geothermal Steam Act specifically exempts Indian land from its reservation and leasing provisions. See, 30 U.S.C. §§1024, 1002, and 1014(c)(4), which, when read together, reach this result.

This most recent statement of Congressional purpose supports the principle that Indian people are free to develop their own natural resources in the way they see fit.

It would be absurd for the Ninth Circuit opinion to be cited as an explication of why Indians must be denied geothermal resources when the Act which mandated this very lawsuit expressly exempted Indian land from its scope.

If any doubt or ambiguity in this regard should exist, and evidently it does, then those doubts should be reconciled so as to benefit the Indian people to whom the Indian lands savings clause of the Geothermal Steam Act was addressed. Bryan v. Itasca County, 426 U.S. 373, 392 [1976]; Worcester v. Georgia, 31 U.S. [6 Pet.] 515, 582 [1832]; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 [1918]; Choate v. Trapp, 224 U.S. 665, 675 [1912].

CONCLUSION

Certiorari should be granted in this case because of its potential impact upon rights to geothermal resources lying in and upon lands which have been conveyed by the United States subject to a reservation of "minerals". The Ninth Circuit opinion inadequately addresses important legal issues arising under the Geothermal Steam Act of 1970--issues which should be authoritatively settled by this Court.

The ultimate disposition of this case is of profound importance to Indian people for two important reasons. First, if upheld, it may serve as a means of divesting Indian people of title to valuable geothermal resources. Second, the Ninth Circuit's failure to take account of the impact of its decision on federally reserved and private appropriative rights

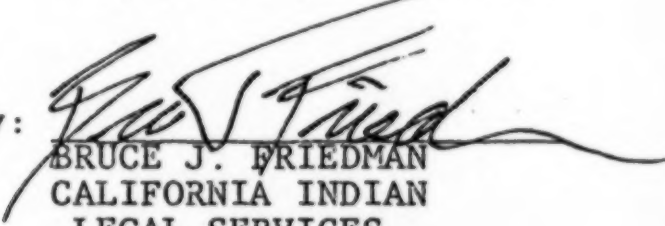
to groundwater may have an adverse impact on Indian water rights. In this regard, whatever the disposition of the instant proceeding may be, the Court is urged to address the issue of whether the Ninth Circuit opinion is authoritative as to Indian lands and Indian rights to geothermal and other natural resources. For the reasons stated in this brief, amicus submits that it is not.

Finally, this Court should grant certiorari because this case is a proper one for the Court to exercise the supervisory power it has over lower federal courts. In its review of the legislative history of the Stock-Raising Homestead Act of 1916, the Court of Appeals attributed to Congress a legislative intent--to completely separate the surface and subsurface estates--which is, at best, ambiguous. Amicus submits that the Court of Appeals overstepped the bounds of judicial interpretation and invaded the province of the legislative branch. This reason alone provides a sound and compelling basis for intervention by this Court.

Dated this 26th day of September, 1977.

Respectfully submitted,

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